

**Objection to the Issuance of Solid Waste Facility Permit
Medora Sanitary Landfill, Jackson County, Indiana
2006 OEA 35 (06-S-J-3679)**

TOPICS:

evidence
authentication
local regulations
zoning
summary judgment
dismissal
12(B)(6)

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Permittee: Amy E. Romig, Esq.; Sue A. Shadley, Esq., Plews, Shadley, Racher & Braun
Petitioner: Gary Johnson, *pro se*
IDEM: Steven Griffin, Esq.

ORDER ISSUED:

September 28, 2006

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

**Objection to the Issuance of Solid Waste Facility Permit
Medora Sanitary Landfill, Jackson County, Indiana
2006 OEA 35 (06-S-J-3679)**

STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	

IN THE MATTER OF:)

OBJECTION TO THE ISSUANCE OF)
SOLID WASTE FACILITY PERMIT)
MEDORA SANITARY LANDFILL)
JACKSON COUNTY, INDIANA)

CAUSE NO. 06-S-J-3679

Medora Timber LLC)
Petitioner)

Rumpke of Indiana LLC)
Permittee/Respondent)

Indiana Department of Environmental)
Management)
Respondent)

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER**

This matter having come before the Court on the Motion for Summary Judgment filed by Rumpke of Indiana LLC (the "Permittee"), which pleading is a part of the Court's record; and the Environmental Law Judge ("ELJ"), being duly advised and having read and considered the petitions, motions, evidence, and the briefs, responses and replies of the parties, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Order:

Findings of Fact

1. On January 25, 2006, the Indiana Department of Environmental Management (the "IDEM") issued a solid waste facility minor permit modification for the Medora Sanitary Landfill (the "Facility") located at County Road 875 West, Jackson County, Indiana to Rumpke of Indiana LLC (the "Permittee"). On or about January 28, 2006, Medora Timber LLC (the "Petitioner") received notice of this modification. Gary Johnson, owner-member of the Petitioner, filed a Petition for Review on behalf of Medora Timber LLC, on February 9, 2006. The Petitioner asserts that it is aggrieved or adversely affected by the modification because (1) the Petitioner owns property adjacent to the Facility and (2) that the modification did not contain the proper conditions. The Petitioner asserts that the modification should include a requirement to comply with special exceptions passed by the Board of Zoning Appeals of Jackson County, Indiana.

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2. On February 15, 2006, the presiding Environmental Law Judge found that the Petition for Review was incomplete and ordered the Petitioner to supplement the petition within thirty (30) days. On March 17, 2006, the Petitioner complied with the order.
3. A prehearing conference was held on May 3, 2006, at which all parties were present. This ELJ issued a Case Management Order on May 4, 2006 ordering the parties to file preliminary witness and exhibit lists on or before May 19, 2006.
4. On May 16, 2006, the Petitioner filed correspondence purporting to be a preliminary witness and exhibit list. This correspondence included copies of various documents, including the permit modification, a map of the Facility and findings of fact by the Jackson County Board of Zoning Appeals Special Exceptions Petition Nos. 04-9739 SE, 04-9740 SE and 04-9741 SE, dated November 10, 2004 (the "Special Exceptions"). The Permittee and the IDEM filed their preliminary witness and exhibit lists on May 19, 2006.
5. On July 14, 2006, the Permittee filed Rumpke of Indiana LLC's Motion for Summary Judgment asking that summary judgment be entered in its favor.¹ The Petitioner did not file a response.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to IC 4-21.5-7-3.
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. 4-21.5-3-27(d). "*De novo* review" means that:

all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

4. The OEA may enter judgment for a party if it finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law." IC 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be

¹ The IDEM has not filed a brief either supporting or opposing this Motion for Summary Judgment.

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construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind.Ct.App. 2000). However, “Summary judgment may not be granted as a matter of course because the opposing party fails to offer opposing affidavits or evidence, but the administrative law judge shall make a determination from the affidavits and testimony offered . . .” Ind. Code § 4-21.5-3-23(b).

5. In order for the ELJ to consider the evidence attached to the Motion for Summary Judgment, the evidence must be admissible.² In this instance, the Permittee has attached copies of the Jackson County Board of Zoning Appeals Special Exceptions Petition Nos. 04-9739 SE, 04-9740 SE and 04-9741 SE, dated November 10, 2004 as Attachments 2, 3, and 4 to Exhibit B. Exhibit B is an affidavit from the Permittee’s attorney stating that she received the copies from the Petitioner. If this was intended to lay the foundation for the admission of Attachments 2, 3, and 4, it is insufficient.³ The documents must still be authenticated. The Indiana Rules of Evidence, Rules 902 and 1005, set out the requirements for authenticating public records. Permittee has failed to properly authenticate Attachments 2, 3 and 4, therefore, they may not be considered by the ELJ in determining the outcome of this matter.
6. A consideration of these attachments is not necessary in this case. The Petitioner has alleged that this permit was improperly issued because IDEM did not include the Special Exceptions as conditions in the permit. The Petitioner does not cite to any authority which authorizes IDEM to either (1) include the Special Exceptions or (2) enforce the Special Exceptions. This ELJ is unable to find any statutory or regulatory authority which allows IDEM to make a local government’s mandates a term or condition of a permit.⁴ Enforcement of such local requirements is the obligation of the local governing body, not the IDEM.
7. As the IDEM does not have the authority to require compliance with or enforce local zoning regulations, the Office of Environmental Adjudication does not have the jurisdiction to require IDEM include the Special Exceptions as terms and conditions of the permit.
8. The Permittee has moved for summary judgment and this ELJ finds that there is no genuine issue as to material fact and concludes that summary judgment is appropriate. However, the nature of this judgment is more analogous to a dismissal for failure to state a claim upon which relief can be granted. In this vein, the ELJ concludes that the Petitioner has failed to state a claim for relief that the OEA can grant.

² Ind. Code § 4-21.5-3-23; *Indiana University Medical Center v. Logan*, 728 N.E.2d 855 (Ind. 2000).

³ The ELJ does not consider these documents to be inadmissible because of hearsay. Public records are an exception to the hearsay rule. Indiana Rules of Evidence, Rule 803(8). In addition, hearsay is admissible in an administrative proceeding. Ind. Code § 4-21.5-3-26(a).

⁴ The permit includes the following language, “In accordance with 329 IAC 10-13-4, solid waste facility permit FP36-01, as amended by this minor permit modification, does not authorize: any injury to any person or private property; the invasion of other private rights; the infringement of federal, state or local laws or regulations; nor preempt any duty to comply with other state or local requirements.”

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FINAL ORDER

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Permittee's Motion for Summary Judgment is **GRANTED**.

You are further notified that pursuant to provisions of IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 28th day of September, 2006 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge